

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 744 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?  
1-2 Yes 3 to 5 No

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VALIMAD PIRBHAI SUNESARA

Versus

STATE OF GUJARAT

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Appearance:

MR JA ADESHRA for Petitioner

MS. HARSHA DEVANI, AGP, for Respondent No. 1, 2

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CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 07/07/98

ORAL JUDGEMENT

The grievance voiced by the petitioner, Deputy Executive Engineer (Civil) is that the Departmental Promotion Committee which met on 15.12.1997 for considering the case of the persons eligible for promotion to the post of Executive Engineer (Civil) has not considered his case. Shri Anil Patel, Under Secretary, Narmada Water Resources and Water Supply Department, Sachivalaya, has filed an affidavit stating

that before the meeting of the Departmental Promotion Committee, in two cases Government had taken conscious decision to initiate departmental enquiry against the petitioner on 9.5.1996 and 30.6.1997. The case of the petitioner was considered by the Departmental Promotion Committee held on 15.12.1997 but because of the decision to initiate departmental enquiry and in view of the Resolution dated 23.9.1991 sealed cover procedure was followed. Accordingly recommendation of the said Departmental Promotion Committee has been kept in sealed cover.

2. It is contended by Mr. Adeshara, learned counsel for the petitioner that in respect of the alleged incidents of the period 25.3.1991 and 1.9.1992 the petitioner was given show cause notices dated 28/29-10-1994 and 22-12-1993. Reply to the said notices were given as back as on 22/28-11-1994 and 9.2.1994 respectively. After almost six years of the incident and after more than three years from the date of reply to the show cause notice a charge-memo has been served on the petitioner on 7.1.1998. The petitioner has denied those allegations. It is also submitted that the allegations are not only false and fabricated but they are vague. It is also submitted that the initiation of departmental enquiry is illegal and arbitrary being belated. The main contention advanced by Mr. Adeshara is that the sealed cover procedure has been wrongly adopted by the Departmental Promotion Committee, as till 15.12.1997, the date on which D.P.C. met admittedly no charge-memo was served upon him. Relying on the decision of the apex court in the case of UNION OF INDIA VS. K.V. JANKIRAMAN reported in AIR 1991 SC 2010 it is contended that sealed cover procedure can be resorted only after the charge memo/ charge-sheet has been issued to the employee. On the other hand Ms. Harsha Devani, learned AGP, submits that a conscious decision was taken to initiate departmental enquiry against the petitioner on 9.5.1996 and 30.6.1996 i.e. before the meeting of Joint Departmental Promotion Committee and as such the decision of the apex court in Jankiraman's case (supra) does not advance the case of the petitioner. Relying on the decision of the apex court in the case of DELHI DEVELOPMENT AUTHORITY VS. H.C. KHURANA reported in (1993) 3 SCC 196 and UNION OF INDIA VS. KEWAL KUMAR reported in (1993) 3 SCC 204 and another decision of the apex court in the case of STATE OF M.P. VS. SYED NASEEM ZAHIR reported in 1993 Supp (2) SCC 225, it is submitted that when a decision is taken to initiate disciplinary proceedings sealed cover procedure can be resorted irrespective of the fact that charge-sheet has not been

issued. Learned A.G.P. has invited my attention to the Government Resolution dated 23.9.1981 laying down the policy with respect of cases of government servant facing departmental enquiries or whose conduct is under investigation.

3. Thus the question arises for consideration is:

"Whether in view of Jankiraman's case (supra) the Joint Departmental Promotion Committee was in error in resorting the sealed cover procedure in view of the fact that though a conscious decision was taken to initiate departmental proceedings, neither chargesheet was issued nor served on the petitioner?"

4. Before I proceed to deal with different judicial pronouncements on the point, it would be profitable to read the relevant Resolution dated 23.9.1981. The relevant portion of the Government Resolution is extracted as follows:-

"2. The cases of Government servants who are facing Departmental inquiries or whose conduct is under investigation could broadly be classified as under:-

- i) Those who are under suspension; or
- ii) those against whom disciplinary proceedings are initiated i.e. where a charge sheet and the statement of allegations have been issued; or
- iii) those against whom disciplinary proceedings are proposed to be initiated i.e. on the basis of a preliminary enquiry or otherwise a decision has been taken by the competent authority to initiate disciplinary proceedings against them, but where a charge sheet and the statement of allegations have not been issued.

At the outset, it is clarified that in the case of Government servants whose conduct is under investigation i.e. the complaints are being looked into departmentally or otherwise, but no conclusion has been reached about the prima facie misconduct, it should not be a ground for treating the said Government servant, as one whose conduct is under

investigation.

It is, therefore, clarified that in respect of Government servants whose conduct is under investigation, the procedure prescribed hereafter should be followed only after the conclusion of the investigation and when the competent authority, on consideration of the results of the investigation by the agency, departmental or otherwise including the ACB or the Vigilance Commission's advice wherever necessary, has formed an opinion that a charge-sheet may be issued on specific imputation where departmental action is contemplated or that sanction for prosecution may be accorded where prosecution is proposed. Until the competent authority arrives at such a conclusion, the Government servant should be treated on par with others.

3. In respect of Government servants covered under categories (i) to (iii) of para 2 above, the following procedure shall be followed while preparing select lists for promotion or considering cases for promotion where select lists are not being prepared.

i) The Government servants suitability for promotion should be assessed at the relevant time by the Departmental Promotion Committee or other authorities, as the case may be, and a finding reached whether, if the Government servant had not been suspended or his conduct had not been under investigation, he would have been recommended/selected for promotion. Where a select list is prepared, the competent authority should also take a view as to what the Government servant's position in the list would have been but for his suspension."

5. Instant case falls in category 3 i.e. persons against whom disciplinary proceedings are proposed to be initiated i.e. on the basis of a preliminary enquiry or otherwise a decision has been taken by the competent authority to initiate disciplinary proceedings against them but where chargesheet and statements of allegations have not been issued. Dealing with such situation as to

whether procedure should be resorted, the apex court after elaborate discussion in Jankiraman's case held that a promotion etc., cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee to deny the said benefit. To deny the benefit there must be at the relevant time pending at the stage when charge memo/chargesheet has already been issued to the employee. However, this case was not followed by apex court in State of M.P. Vs. Syed Naseem Zahir (supra) because of certain special features of that case. So far as the ratio laid down in Jankiraman's case (supra) is concerned, the court (Kuldip Singh, J) said in para 5, thus:

"The Tribunal allowed the application of Syed on the shrt ground that the Departmental Promotion Committee which met on October 28, 1987 acted illegally in adopting the 'sealed cover' procedure. Relying upon the judgement of this Court in Union of India Vs. K.V. Jankiraman (1991) 4 SCC 109 the Tribunal came to the conclusion that 'sealed cover' procedure could be adopted only after the date of issuance of chargesheet, that being the date from which disciplinary proceedings could be taken to have been initiated. Since in this case, admittedly, on the date when the DPC met the chargesheet had not been served on Syed, reort could not be had to the 'sealed cover' procedure. The reasoning and the conclusion of the Tribunal are unexceptionable. The only question for our consideration is whether in the facts and circumstances of this case specially in view of the events subsequent to the meeting of the DPC, it would be in the interest of justice to promote respondent Syed to the post of Chief Engineer."

6. It is evident from the reading of said passage that in the said case the Supreme Court did not follow Jankiraman's case because of its special features. The glaring fact in the said case was that there was serious allegations against the petitioner. In the said case the deinqunt Engineer alleged to have made excess payment to the tune of sum of Rs. 80 lakhs. The matter was enquired and preliminary report was received which indicated his involvement. After examining the report the State Government had ordered on the file on September 30, 1987 that Departmental proceedings be initiated against him. Chargesheet was served on 15.4.1988. Charges were also found to be proved against him. It is of course true that chargesheet was not served on him on 28.10.1987 when the Departmental Promotion Committee met.

Therefore, it cannot be said that in the case of State of M.P. Vs. Syed Naseem Zahir (supra) the apex court in any way departed from the ratio laid down in Jankiraman's case (supra).

7. In Delhi Development Authority Vs. H.C. Khurana (supra) a charge sheet was served on the petitioner on 13.7.1990. However, the petitioner proceeded on two months medical leave. Therefore on 17.7.1990 another Executive Engineer working in the same wing received and gave intimation that the respondent was on leave adding that the same would be handed over to the respondent on his return from leave. On 28.11.1990 the Departmental Promotion Committee met and in view of the earlier decision to initiate disciplinary proceedings against the respondent, it followed the sealed cover procedure in the case of the petitioner. Chargesheet could be ultimately served personally on the writ petitioner only on 25.1.1991. Following Jankiraman's case the High Court held that the Departmental Promotion Committee was in error in resorting to sealed cover procedure as no chargesheet was served on the writ petitioner till the date when Departmental Promotion Committee met and therefore it cannot be said that any disciplinary proceedings was pending on that date. On appeal by the Delhi Development Authority, the apex court posed the question whether the High Court correctly applied the decision in Jankiraman's case? After elaborate discussion the court held thus:-

"para 14 - 'Issue' of the chargesheet in the context of a decision taken to initiate the disciplinary proceedings must mean, as it does, the framing of the charge-sheet and taking of the necessary action to despatch the chargesheet to the employee to inform him of the charges framed against him requiring his explanation; and not also the further fact of service of the charge-sheet on the employee. "

Thus in Delhi Development Authority's case the Supreme Court explained Jankiraman's case to the extent that it is not only the decision has been taken to initiate departmental proceedings but charges must have also been framed and necessary action to despatch the chargesheet to the employee but it is not necessary that chargesheet has been served on the employee. Thus, the consistent view of the apex court is that ordinarily a promotion should not be withheld merely because some disciplinary or criminal proceedings are pending against the employee. Possibility cannot be ruled out that investigation of the

preliminary enquiry may be kept pending deliberately to deprive a person of the promotion. There are also cases where even though prompt decision is taken, the government employee avoids service of the chargesheet till the date of the meeting of the Departmental Promotion Committee is convened. Thus, to struck balance, the only rational view can be taken is to cast duty on the Department not only to take a conscious decision to initiate the departmental proceedings but also frame the charges and to take effective and sincere steps to serve on the employee. It may not be necessary that the chargesheet is actually served on the delinquent.

8. In the instant case the alleged incidents are of the year 1991. A show cause notice was served as late as in 1994. In spite of the fact that the notice was replied in 1994, it took two years to take a conscious decision to initiate departmental enquiry only in November/December, 1996. It took further two years in framing of charge and service on petitioner, when it was served in 1998. During this period, when D.P.C. met in 1997, except conscious decision, neither the charges were framed, and as such obviously no steps for service were taken. This speaks in volume if not mala fide, lethargy on the part of respondent, for which a person cannot be denied of his right of consideration of promotion on the higher post. Thus, in my view the Departmental Promotion Committee which met on 15.12.1997 was in error in resorting to sealed cover procedure. The case of the petitioner ought to have been considered as if no case was pending against him.

Consequently this Special Civil Application is allowed and the respondents are directed to open the sealed cover and to act as per the recommendation of the Departmental Promotion Committee. The petitioner shall be entitled to all consequential benefits in accordance with rules. Rule made absolute.

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